

1 ALEXANDER CALFO (State Bar No. 152891)
2 acalfo@kslaw.com
3 JULIA ROMANO (State Bar No. 260857)
4 jromano@kslaw.com
5 KING & SPALDING LLP
6 633 West Fifth St., Suite 1700
7 Los Angeles, CA 90071
8 Telephone: (213) 443-4355
9 Facsimile: (213) 443-4310

7 Attorneys for Defendant
KIMBERLY-CLARK CORPORATION

12 CHRISTOPHER P. NAEYAERT,
as an individual,

Case No.

14 Plaintiff,

DEFENDANT KIMBERLY-CLARK CORPORATION'S OPPOSITION TO PLAINTIFF'S NOTICE OF RELATED CASES

15 v.
16 KIMBERLY-CLARK
17 CORPORATION, a Delaware
18 Corporation; and DOES 1 through 10,
ROES 1 through 10, Inclusive,

[Local Rule 83-1.3.3]

19 Defendants.

1 Defendant Kimberly-Clark Corporation (“Kimberly-Clark”) opposes
2 Plaintiff Christopher P. Naeyaert’s request to reassign this case pursuant to Local
3 Rule 83-1.3.3. This attempt to transfer a case regarding a different product and
4 alleging a different injury than the claimed related cases—to the court that is not
5 even presiding over Plaintiff counsel’s first-filed action regarding surgical gowns
6 no less—is another transparent attempt to forum shop and is precisely the sort of
7 gamesmanship the related case rules exist to deter. Plaintiff’s request should be
8 rejected.

I. INTRODUCTION

This is a workplace-injury case in which Plaintiff apparently seeks recovery of damages for unspecified personal injuries allegedly caused by his use of an ULTRA* surgical gown—a medical device manufactured and sold by Kimberly-Clark—while working as a physician’s assistant for Eisenhower Medical Center (“Eisenhower”). Plaintiff’s lawsuit is fundamentally different from the two cases Plaintiff identified in his Notice of Related Cases. The class action (*Bahamas Surgery Center, LLC v. Kimberly-Clark Corporation*, No. 2:14-cv-08390-DMG-PLA) (“*Bahamas*”), for example, alleges that ***hospitals*** and other ***institutional medical providers*** “overpaid” for a completely different surgical gown, the MICROCOOL* Breathable High Performance Surgical Gown (“MICROCOOL*”). The “false advertising” case (*Medline Industries, Inc. v. Kimberly-Clark Corporation*, No. 2:16-cv-08571 DMG (PLAx) (C.D. Cal.)) (“*Medline*”), alleges that Medline, a ***competitor*** of Kimberly-Clark and Halyard Health, Inc. (who is also a defendant in *Bahamas*), suffered lost sales and other ***competitive*** harm. In stark contrast, the workplace-injury claims at issue here involve an entirely different type of plaintiff, different alleged injuries, different legal claims, different key events, and different requests for relief. And *Bahamas* is now in post-trial proceedings. No relatedness to it can enhance efficient resolution of the present case.

1 Plaintiff's Notice is in reality a transparent attempt at forum shopping.
 2 Plaintiff's counsel here also represents the plaintiff in yet another lawsuit involving
 3 Kimberly-Clark surgical gowns that is before the Honorable John A. Kronstadt,
 4 *United States, ex rel. Hryar Shahinian v. Kimberly-Clark Corporation*, No. 2:14-
 5 cv-08313-JAK-JR (C.D. Cal.) ("Qui Tam Action"). The Qui Tam Action involves
 6 alleged violations of the federal False Claims Act arising from the sale of
 7 Kimberly-Clark surgical gowns, and that action was filed *before Bahamas* or
 8 *Medline*. Yet, no attempt to transfer *Bahamas* or *Medline* to Judge Kronstadt was
 9 ever made, and Plaintiff's present Notice makes no mention of the Qui Tam Action
 10 whatsoever. A finding that the present case is related to a previously filed one
 11 would, under this District's internal procedures, require the reassignment of this
 12 case to Judge Kronstadt, where the first-filed case raising allegations about
 13 Kimberly-Clark gowns is pending, relief Plaintiff's counsel has never sought to
 14 obtain. General Order No. 16-5, II.I.2.

15 In reality, none of the cases are sufficiently similar to each other to warrant
 16 burdening any single judge with the kind of *de facto* MDL Plaintiff appears to be
 17 trying to manufacture. Accordingly, this Court should decline to reassign the case.

18 **II. BACKGROUND**

19 **A. Procedural History Of The Purportedly Related Cases**

20 The instant case is the fourth lawsuit filed by various entities or individuals,
 21 all represented by Plaintiff's counsel (Eagan Avenatti), against Kimberly-Clark
 22 (and in some cases Halyard Health, Inc.) for issues allegedly arising from the sale
 23 and use of surgical gowns.

24 The first lawsuit to be filed was the Qui Tam Action, filed on October 27,
 25 2014 and assigned to Judge Kronstadt. Two days later, the relator in the Qui Tam
 26 Action also filed *Bahamas*, a putative consumer-fraud class action. That case was
 27 assigned to Judge Gee. The plaintiff there represents a class of California end-
 28 purchasers of the MICROCOOL* gown – a different surgical gown from that at

1 issue in Plaintiff's lawsuit – based on sales from February 12, 2012 through
 2 January 11, 2015. *Bahamas* does not claim damages for any personal injuries
 3 arising from the use of the MICROCOOL* gown, but rather that class members
 4 because of fraudulent omissions regarding the MICROCOOL* gown paid too
 5 much for them. That claim for fraudulent concealment was tried, and the jury
 6 returned a verdict on April 7, 2016 in *Bahamas*'s favor. The Court subsequently
 7 adjudicated *Bahamas*'s only remaining claim, that for violation of California
 8 Business and Professions Code (Cal. Bus. & Prof. Code § 17200). The parties are
 9 currently engaged in post-trial motion practice.

10 Only after *Bahamas* obtained a favorable jury verdict before Judge Gee on
 11 April 7, 2017 did counsel for Relator Shahinian file a notice of related case in the
 12 Qui Tam Action, inexplicably requesting that ***the first-filed Qui Tam Action*** be
 13 reassigned to Judge Gee, in contravention of this District's procedures requiring
 14 assignment to the first-filed matter. *See* Notice of Related Cases, Qui Tam Action,
 15 Dkt. No. 55 (C.D. Cal. Apr. 14, 2017). On April 19, 2017, Judge Kronstadt
 16 entered an Order declining the reassignment of any of these cases. Order, Qui Tam
 17 Action (C.D. Cal. Apr. 19, 2017).

18 Finally, on November 17, 2016, Plaintiff's counsel also filed *Medline*, a
 19 third case in this District against Kimberly-Clark and Halyard Health, Inc.
 20 *Medline* involves claims for false advertising and promotion under the federal
 21 Lanham Act (Section 43(a)), false advertising (Cal. Bus. & Prof. Code § 17500),
 22 unfair competition (Cal. Bus. & Prof. Code § 17200), and common-law unfair
 23 competition. The lawsuit targets the MICROCOOL* gown, as well as a different
 24 model of gown known as the ULTRA* surgical gown, which is not at issue in the
 25 Qui Tam Action or *Bahamas*.

26 *Medline* was originally assigned to the Honorable Stephen V. Wilson. But
 27 before the plaintiff served the complaint on Kimberly-Clark, the plaintiff filed a
 28 Notice of Related Cases identifying *Bahamas* as a related case, never mentioning

1 the also-pending, first-filed Qui Tam Action. Notice of Related Cases, *Medline*,
 2 Dkt. No. 4 (C.D. Cal. Nov. 17, 2016). *Medline* was then reassigned to Judge Gee.
 3 Order, *Medline*, Dkt. No. 9 (C.D. Cal. Nov. 23, 2016). Because *Medline*'s counsel
 4 filed the Notice *ex parte* before Kimberly-Clark was even served, Kimberly-Clark
 5 did not have the opportunity to object to the transfer. After being served with the
 6 complaint, however, Kimberly-Clark moved to transfer *Medline* to the Northern
 7 District of Georgia, the appropriate forum for that action. *See* Motion to Dismiss
 8 and to Transfer Venue, *Medline* (C.D. Cal. Mar. 31, 2017). Kimberly-Clark's
 9 motion is now fully briefed and pending resolution by the Court. It is set for
 10 hearing on May 26, 2017.¹

11 **B. The Instant Action**

12 Plaintiff initiated this lawsuit in the Superior Court of California, for the
 13 County of Riverside, on July 21, 2016. Plaintiff named as defendants both
 14 Kimberly-Clark and his employer Eisenhower. The FAC alleges that Eisenhower
 15 (not Plaintiff) purchased ULTRA* surgical gowns and made them available for its
 16 employees, including Plaintiff, to use during surgeries. (FAC ¶ 1.) Plaintiff
 17 further alleges that the ULTRA* gowns were defective, and that as a result of those
 18 defects a gown he wore during a surgery failed, allowing bodily fluids to contact
 19 him, resulting in a non-specific "infection." (*Id.*) Plaintiff apparently seeks
 20 recovery for alleged physical and emotional injuries. (*See* Plaintiff's Mar. 10,
 21 2017 Case Management Statement, attached as Ex. "A" to Kimberly-Clark's
 22 Notice of Removal ("While an employee of Eisenhower Medical Center, Plaintiff
 23 suffered medical and emotional damages that are unknown at that time . . .").)

24
 25
 26 ¹ Plaintiff's Notice Of Related Case filed in the Qui Tam Action also asserted
 27 relatedness to *Medline* before Judge Gee. Judge Kronstadt, however, declined to
 28 transfer the Qui Tam Action to Judge Gee as well. *See* Order, *Medline*, Dkt. No.
 39 (C.D. Cal. Apr. 19, 2017).

1 Kimberly-Clark timely and properly removed this case to this Court on May
 2 15, 2017. The next day, Eagan Avenatti filed a Notice of Appearance on behalf of
 3 Plaintiff in this action, dismissed Eisenhower without prejudice, and filed the
 4 instant Notice of Related Cases. As in counsel's prior Notices, Plaintiff identifies
 5 only the *Bahamas* and *Medline* cases as purportedly related cases, but fails entirely
 6 to mention the first-filed Qui Tam Action.

7 **III. ARGUMENT**

8 As an initial matter, it is premature to transfer this case based on any relation
 9 with *Medline*, since a motion to transfer *Medline* out of this district is currently
 10 pending before Judge Gee. *See Motion to Dismiss and to Transfer Venue, Medline*
 11 (C.D. Cal. Mar. 31, 2017). If granted, there is simply no basis to transfer this case,
 12 as the only remaining case before Judge Gee—*Bahamas*—will by then be
 13 essentially resolved. As explained above, *Bahamas* is already in post-trial briefing,
 14 while Kimberly-Clark has not even responded to Plaintiff's FAC in this case.

15 Even if the motion to transfer *Medline* is not granted, it would still be
 16 premature to transfer because Kimberly-Clark believes Plaintiff's FAC is
 17 hopelessly defective. No transfer decision should be made until the parties and the
 18 Court have clarity on what claims, if any, Plaintiff can or will actually pursue,
 19 given the unclear nature of his fraud/personal injury claims as currently pled.

20 In any event, even if the Court were to decide this motion at the present
 21 time, this case would not meet the standard for transfer to Judge Gee. Local Rule
 22 83-1.3.1 requires parties to file a Notice of Related Cases whenever two or more
 23 cases in this District:

- 24 (a) arise from the same or a closely related transaction, happening, or event;
- 25 (b) call for determination of the same or substantially related or similar
 questions of law and fact; or
- 26 (c) for other reasons would entail substantial duplication of labor if heard by
 different judges.

27
 28 None of these requirements are satisfied.

1 **First, Bahamas is irrelevant to consideration of Plaintiff's Notice**
 2 **because that case has already proceeded through trial.** As the case is
 3 essentially ended, there are no efficiencies to be gained from presenting this case
 4 and *Bahamas* before the same judge. Moreover, *Bahamas* relates entirely to a
 5 medical gown—the MICROCOOL* surgical gown—not at issue in this case,
 6 which involves only allegations regarding the ULTRA* surgical gown.

7 **Second, Medline does not require transfer because Plaintiff's claims**
 8 **against Kimberly-Clark in this action do not arise from the same transaction**
 9 **or events as the plaintiff's claim in Medline.** While there may be some limited
 10 overlap with issues to be resolved in *Medline*, the instant case presents numerous
 11 unique issues that indicate the case will proceed quite differently than in *Medline*.
 12 As discussed above, Plaintiff alleges that he experienced personal injuries as a
 13 result of his use of the ULTRA* surgical gown during a procedure on a particular
 14 (although not stated) date while working at Eisenhower. (FAC ¶ 1.) Plaintiff
 15 further alleges that his employer Eisenhower, and not he, purchased the ULTRA*
 16 surgical gowns, and made them available for its employees to use in surgeries.
 17 (*Id.*) Thus, this is a workplace-injury case, not a business-tort case in which
 18 Plaintiff seeks economic damages, as in *Medline*. Discovery and motion practice
 19 here will need to dive into the events surrounding Plaintiff's alleged “infection.”
 20 These facts are specific only to this case and the circumstances of Plaintiff's
 21 employment.

22 **Third, this case presents distinct legal and factual issues.** Should
 23 Plaintiff's claims survive beyond the pleadings stage, a central issue during
 24 discovery and then at trial will be that of causation, *i.e.*, what was the cause of
 25 Plaintiff's alleged personal injury. This will require investigation of Plaintiff's
 26 medical history, the nature and extent of his alleged injury as well as its cause, and
 27 his alleged use of the ULTRA* gown. Another issue will be that of notice, which
 28 will require discovery into Kimberly-Clark's knowledge of the allegedly defective

1 condition in the ULTRA* gowns, as well as what information was provided to
 2 Plaintiff and his employer about the ULTRA* gown. Plaintiff's reliance, or lack
 3 thereof, on any specific representation made by Kimberly-Clark regarding the
 4 ULTRA* gowns will also be an issue in this case. These issues are largely distinct
 5 from the issues presented in *Medline* or *Bahamas*, neither of which involves any
 6 claim of personal injury or any individual's use of the gowns. (Findings of Fact
 7 and Conclusions of Law, *Bahamas*, Dkt. No. 529 at 7 (C.D. Cal. May 15, 2017)
 8 (finding "no evidence that anyone had suffered physical harm").

9 **Fourth, separate consideration of these cases will not result in**
 10 **duplication of efforts.** As described above, this case presents unique factual and
 11 legal issues that have not and will not be considered in the purportedly related
 12 cases, and therefore reassignment will not result in gained efficiencies. Should this
 13 case proceed, extensive discovery remains to be conducted on the ULTRA*
 14 gown's purported connection to the facts unique to this case, including for
 15 example, the high probability of case-specific medical expert discovery and the
 16 collection of extensive medical and employment records, which will not be
 17 expedited by reassigning this case.

18 **Finally, Plaintiff's transparent attempt at forum shopping further**
 19 **compels declining reassignment in this case.** There is gamesmanship afoot here,
 20 which is most clearly demonstrated by Plaintiff's omission of the first-filed Qui
 21 Tam Action from his Notice, despite counsel's prior representations to this District
 22 that the Qui Tam Action is a related case. Plaintiff's omission is a clear attempt to
 23 avoid this Court's first-filed transfer rule. *See* General Order No. 16-5, II.I.2.² If

25 ² *See also Alltrade Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991);
 26 *Wallerstein v. Dole Fresh Vegetables, Inc.*, 967 F. Supp. 2d 1289, 1294 (N.D.
 27 Cal. 2013) (finding "that the first-to-file rule is not limited to cases brought in
 28 different districts"); *Olin Corp. v. Continental Casualty Co.*, No. 2:10-cv-00623,
 2011 WL 1337407, at *2 (D. Nev. April 6, 2011) (stating that "the purpose of the
 first-to-file rule can even be served by applying the rule where related cases are

1 Plaintiff's arguments of judicial economy are to be believed, there is no justifiable
2 reason for omitting the Qui Tam action, other than to advance a misguided forum-
3 shopping endeavor within this District. The Court should not reward Plaintiff and
4 should decline reassignment because it will not serve the interests that underlie
5 L.R. 83.1.3.

6 In the alternative, if transfer is appropriate, this case should be transferred to
7 Judge Kronstadt, as the judge presiding over the first-filed case.

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court should decline to reassign this case
10 under L.R. 83.1.3.

11
12
13 DATED: May 18, 2017

KING & SPALDING LLP

14
15 By: /s/ Alexander Calfo
16 Alexander Calfo

17 Attorneys for Defendant
18 KIMBERLY-CLARK CORPORATION

19
20
21
22
23
24
25
26
27 pending before two judges in the same district") (internal quotation marks
28 omitted).